

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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POSTN-111979-08

UILC: 6672.00-00

date: April 09, 2008

to: Davida Parker
Acting Appeals Collection Program Analyst, Appeals, Tax Policy & Procedure

from: Brinton T. Warren
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subject: Power of Attorney and Timely TFRP Protest

This Legal Advice responds to your request for assistance dated March 13, 2008. This advice may not be used or cited as precedent.

ISSUES

1. Is a protest letter under section 6672(b)(3)(B) timely filed (within the prescribed sixty day period) when the taxpayer's purported representative files the protest letter, but no Form 2848, Power of Attorney and Declaration of Representative, (POA), accompanies such letter?
2. What if such protest letter is accompanied by a defective POA?
3. Should a nominal period be permitted, beyond the sixty day period, to provide a valid POA or cure a defective one already provided?
4. What is the proper treatment of cases currently within the Service's inventory arising under the circumstances described in Issues 1 and 2?

CONCLUSIONS

1. Yes. The principles of agency law give effect to a protest letter sent by a taxpayer's representative within the prescribed sixty day period regardless of whether the letter was accompanied by a valid POA.
2. Yes. The protest letter is timely filed even if accompanied by a defective POA. If the accompanying POA is defective, either the taxpayer or the third party should be contacted for a valid replacement. The party to contact is determined pursuant to I.R.M. 21.3.7.9.3.

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3. The Service should provide a nominal period in which the taxpayer can produce a valid, correct POA as it does in the case of an incorrect or incomplete protest.
4. The proper treatment of current cases falling within the parameters of Issue 1 is for appeals to secure a waiver within a reasonable time period and resume review of the appeal. Neither the Code nor the Conference and Practice and Requirements establish any requirements as to the offices within the Service that should handle the processing of these matters.

FACTS

Taxpayers are given sixty days to file a protest letter (protest) under section 6672(b)(3)(B). Taxpayer representatives routinely file these protests on behalf of taxpayers. This memorandum provides guidance as to the proper treatment of protests received from representatives within the prescribed time period when no valid Form 2848 accompanies the protest.

LAW AND ANALYSIS

I. Treatment of Timely Protest Letter Not Accompanied by Form 2848 or Similar Statement.

Section 6672(a) states that any person who is required to collect, truthfully account for, and pay over any tax imposed under the Code and who willfully fails to do so or willfully attempts to evade or defeat such tax is liable for a penalty equal to the total amount of the tax not paid over to the government. A penalty under section 6672(a) will not be imposed unless the Service sends written notification to the taxpayer regarding his liability. Once the taxpayer receives this notification he has sixty days to send a protest letter.

Section 6672 does not explicitly address the issues posed above nor does any other provision of the Code or the regulations. The Tax Court, in prior cases¹ has applied the law of agency as a supplement to the Code and regulations. The Conference and Practice Requirements also suggest that the law of agency is an acceptable supplement to the Code and regulations. The law of agency provides guidance that protects both a taxpayer's right to file a protest under section 6672(b)(3)(B) and the Service's time to assess the penalty imposed by section 6672(a).

The relationship between client and representative is akin to that of principal and agent, in which the representative is authorized to act for or in place of the client. In order to bind the principal, the agent must have either actual or apparent authority or the principal must ratify the agent's actions.

¹ Trans World Travel v. Commissioner, T.C. Memo. 2001-6 (2001); Willoughby v. Commissioner, T.C. Memo. 1994-398 (1994); Joint Implant Surgeons, Inc. v. Commissioner, T.C. Memo. 1988-558 (1988).

Actual authority is the fiduciary relationship that results from the manifestation of consent by one person (the principal) to another person (the agent) that the agent shall act on the principal's behalf, subject to the principal's control, and the agent so consents to act. Actual authority can be created expressly or through implication. The relationship need not be defined in writing.

When a taxpayer engages a representative to represent him before the Service, an agency relationship is formed. In most cases the representative has actual authority to represent the taxpayer. The rights of the parties involved, including the taxpayer, representative and the Service, depend on whether the principle is disclosed, undisclosed or unidentified. In this situation, the principal is disclosed, meaning that when the Service and the taxpayer's representative interact, the Service has notice that the representative is acting for a taxpayer and has notice of the taxpayer's identity². Under these circumstances, both the taxpayer and the Service are bound by the representative's actions. Therefore, if the representative acts with actual authority, the Service is bound by such actions regardless of whether a Form 2848 accompanies the protest letter. The Service, however, should request that such agency relationship be set forth in writing, preferably on Form 2848³.

Apparent authority, and the power to bind the purported principal, arises when a third party reasonably believes that the agent has the authority to act on the principal's behalf and the third party's belief is based on the principal's manifestation. We cannot rely solely on the doctrine of apparent authority under the circumstances described above because in the typical case, the taxpayer will not have made a manifestation to the Service regarding the agent's role as such. The common law doctrine of ratification, however, may apply. When a purported principal ratifies another's actions, the purported principal's legal relations are affected as they would have been had the other person been an agent acting with actual authority at the time of the act. Therefore, if the taxpayer takes an affirmative step to ratify the agent's action, the Service and taxpayer will be bound by the agent's action as of the date of the act. Therefore, as above, the Service is bound by such actions regardless of whether a Form 2848 accompanies the protest letter as long as the taxpayer takes some affirmative step to ratify the representative's action. The Service, however, should request that such agency relationship be set forth in writing, preferably on Form 2848.

² I.R.M. 5.7.6.1.5 provides that a formal written request must include, among other things, the responsible party's name, address and social security number.

³ I.R.M. 5.7.6.1.6 states that if the protest is timely, meaning it was mailed on or before the 60th day after the mailing or personal delivery of Letter 1153, it must be reviewed within 10 days of receipt to determine if the information is complete. If the information is not complete, a taxpayer will have at least 45 days to perfect any defects. Even if the protest remains defective, the case will be sent to Appeals, which will also provide the taxpayer will an opportunity to provide the missing information. This time frame and process should be equally applicable to a missing or defective POA. See also I.R.M. 8.25.1.2.1(2),(5).

II. Treatment of Timely Protest Letter Accompanied by a Defective POA.

The principles of agency law discussed above are equally applicable when a timely protest letter is accompanied by a defective POA. In this situation, the POA will be sent back to the taxpayer or the representative, depending on what type of defect is involved. Upon receipt of such POA, the taxpayer or agent can cure the defect by executing a Form 2848 that includes the missing information. Attaching a Form 2848 to a copy of the original power of attorney will validate the original power of attorney.

III. Treatment of Cases Already in Appeals

Appeals should secure the necessary Form 2848 from the taxpayer or taxpayer's representative. If the Form 2848 or similar statement is not provided within a reasonable amount of time, appeals should refer the case to collection. A taxpayer who refuses to provide a POA or perfect a POA within a reasonable amount of time, will have, for purposes of section 6672(b), withdrawn their protest as of the day after the reasonable amount of time expires.

IV. Compliance or Appeals- Who Should Perfect the POA?

Neither the code nor the regulations provide guidance as to whether compliance or appeals is responsible for perfecting the POA. Therefore, we will not opine as to which of the two divisions is responsible.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call Procedure & Administration, Branch 2 at (202) 622-4940 if you have any further questions.